FILED
JUN 10 1997
OFFICE OF THE CLERK

No. 96-1766

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, AND MICHAEL J. MAZZONE,
Cross-Petitioners,

v.

TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, W. FRANK NEWTON, THOMAS R. PHILLIPS, RAUL R. GONZALEZ, NATHAN L. HECHT, JOHN CORNYN, CRAIG T. ENOCH, ROSE SPECTOR, PRISCILLA R. OWEN, JAMES A. BAKER, AND GREG ABBOTT,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CROSS-PETITIONERS' REPLY BRIEF

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Date: June 10, 1997

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CROSS-PETITIONERS' REPLY BRIEF

The brief in opposition asserts that there is no conflict within the courts of appeals regarding issues raised in the Cross-Petition, and further asserts that any such conflict is irrelevant to the outcome of this case. Cross-Respondents are demonstrably wrong on both counts. Moreover, Cross-Respondents do not dispute any of the factual premises upon which the Cross-Petition is based.

Most importantly, Cross-Respondents do not contest that the Fifth Circuit, in its arm-of-the-State analysis, refused to accord any weight to the absence of evidence that money judgments entered against the Texas Equal Access to Justice Foundation would be payable from the Texas treasury. That refusal is in direct conflict with the approach of numerous other courts of appeals, which have looked to such evidence as the *most important* factor in Eleventh Amendment arm-of-the-State determinations.

ARGUMENT

1. Cross-Respondents Texas Equal Access to Justice Foundation, *et al.* (collectively, "TEAJF"), do not contest that Cross-Petitioners Washington Legal Foundation, *et al.* (collectively, "WLF"), raised in the lower courts the precise issue they seek to press in this Court. *See* Opposition Brief at 2. Citing *Hess v. Port-Authority Trans-Hudson Corp.*, 115 S. Ct. 395 (1994), WLF argued in both the district court and the court of appeals that, in the absence of *any* evidence that money judgments against TEAJF would be payable from the State treasury, TEAJF was not entitled to Eleventh Amendment immunity as an arm of the State of Texas. The lower courts' failure to address that issue in their written decisions serves only to highlight the need for review of the issue by this Court.

2. Nor does TEAJF's Opposition dispute that there is no evidence in the record suggesting that a judgment against TEAJF would be payable from the Texas treasury. Indeed, TEAJF has *never* argued -- either here or in the courts below -- that any judgment would be so payable. Accordingly, this Cross-Petition squarely raises the issue of whether and when a State entity can be deemed an arm of the State for Eleventh Amendment purposes in the absence of evidence that a judgment against the entity would be payable from the State treasury.

3. TEAJF's assertion that there is no conflict among the courts of appeals on that issue is demonstrably wrong. The Second, Third, Fourth, and Tenth Circuits -- contrary to the courts below -- would almost certainly deny Eleventh Amendment immunity to TEAJF under the facts of this case. Each of those courts of appeals has (based on *Hess*) attached overriding significance to the "State treasury" factor in determining whether a State-created entity is entitled to Eleventh Amendment immunity as an arm of the State. *See, e.g., Mancuso v. New York State Thruway Authority,* 86 F.3d 289, 293 (2d Cir.), *cert. denied,* 117 S. Ct. 481 (1996); *Independent Enterprises Inc. v. Pittsburgh Water and Sewer Auth.,* 103 F.3d 1165 (3d Cir. 1997); *Gray v. Lewis,* 51 F.3d 426, 431-33 (4th Cir. 1995); *Sonnenfeld v. City and County of Denver,* 100 F.3d 744, 749 (10th Cir. 1996), *cert. denied,* 65 U.S.L.W. 3572 (U.S. May 19, 1997).

In contrast, the court of appeals in this case did not even discuss the "State treasury" factor in determining that TEAJF was entitled to Eleventh Amendment immunity. Phillips Pet. App. 18a. One can conclude from the absence of such discussion -- despite WLF's reliance on the "State treasury" factor in its brief -- that the Fifth Circuit determined that evidence that the Texas treasury would not be liable for a judgment against TEAJF should not weigh

heavily in its Eleventh Amendment calculus. That determination is directly contrary to the court of appeals decisions cited above. *See, e.g., Independent Enterprises,* 103 F.3d at 1173 ("We have repeatedly held that the most important factor in determining whether an entity is an 'arm of the State' is whether any judgment would be paid from the state treasury.")(citation omitted).

4. The courts of appeals that have focused primarily on the "State treasury" factor in resolving Eleventh Amendment issues have done so on the basis of this Court's decision in *Hess*. *Hess* held that, at least in the context of bistate entities, "the most salient factor in Eleventh Amendment determinations" is whether any judgment against the entity is payable from State treasuries. *Hess,* 115 S. Ct. at 400. In light of that language, the Fifth Circuit's failure to address WLF's uncontroverted "State treasury" argument only makes sense if the Fifth Circuit had determined that *Hess*'s "most salient factor" holding was inapplicable to the instant case. And indeed, the Fifth Circuit in its prior *Pillsbury* decision had made just such a determination: it held that *Hess* is inapplicable to cases involving entities (such as TEAJF) established by a single State but rather is "a limited holding addressing the standard to be applied to bistate entities. . ." *Pillsbury Co. v. Port of Corpus Christi Authority*, 66 F.3d 103, 104 (5th Cir. 1995), *cert. denied,* 116 S. Ct. 1705 (1996). The conflict between the Fifth Circuit on the one hand and the Second, Third, Fourth, and Tenth Circuits on the other hand could not be clearer and is outcome-determinative under the facts of this case.

5. *Hess* held that in addition to being designed to protect State treasuries from federal court judgments, the Eleventh Amendment was also intended to maintain a degree of respect for State sovereignty. *Hess,* 115 S. Ct. at 404 ("the Eleventh Amendment's twin reasons for being

remain our prime guide" on immunity issues). The clearest indication that the court below thought *Hess* inapplicable to cases (such as this) involving single-state entities was its failure to address *either* of the those two factors. Rather, the appeals court held that Eleventh Amendment immunity extended to TEAJF because "the Texas Supreme Court created the TEAJF pursuant to its rule-making authority and the TEAJF acts on behalf of the Texas Supreme Court to carry out its role, which the Texas Supreme Court defined." Phillips Pet. App. 18a. The appeals court's rationale does not explain how subjecting TEAJF to suit for money damages could either endanger the Texas treasury or challenge Texas's sovereignty.[1]

Cross-Respondents protest that the court of appeals might have taken the "State treasury" factor into account in its Eleventh Amendment determination but deemed the factor unworthy of explicit mention in light of the importance of the other factors that it *did* mention. They state that Fifth Circuit decisions have on occasion taken note of the "State treasury" factor -- even in the context of single-state entities -- and thus cannot be said to have rejected alto-

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[1] If taken literally, the appeals court's rationale would extend Eleventh Amendment immunity to a considerable degree. The three factors cited by the appeals court -- (1) the Texas Supreme Court created TEAJF; (2) the Texas Supreme Court "defined" TEAJF's role; and (3) TEAJF "acts on behalf of the Texas Supreme Court" in carrying out that role -- could be cited with respect to virtually *any* entity created by a State. While recognizing that State sovereignty concerns should inform Eleventh Amendment immunity decisions, *Hess* made clear that immunity does not extend nearly so far. Thus, *Hess* denied immunity to a port authority, even though the port authority was created by New York and New Jersey to carry out a very specific role assigned to it by those states.

gether the relevance of the "State treasury" factor to Eleventh Amendment determinations. Opposition Brief at 5.

Cross-Respondents' argument misses the point of *Hess*. *Hess* sought to get away from the free-form balancing test previously employed by so many appeals courts -- whereby the "State treasury" factor was one of many factors to be considered, with few rules regarding which factors should be given greatest weight. Rather, *Hess* held, when the many relevant factors do not point in the same direction,[2] the Eleventh Amendment issue is to be determined based on two factors alone: the "State treasury" factor and concern for State sovereignty. Accordingly, it is irrelevant that the Fifth Circuit may have given some unspoken consideration to the "State treasury" factor before ultimately deciding the issue in TEAJF's favor; *Hess* requires that the "State treasury" factor (along with concern for State sovereignty) be accorded the *greatest* weight. The Fifth Circuit has held that the weighting process mandated by *Hess* is inapplicable outside the context of bistate entities; at least four other circuits disagree. The Court should grant the Cross-Petition to resolve that conflict.

6. In support of its argument that there is no intercircuit conflict regarding the meaning of *Hess*, TEAJF states, "[A]ll of the decisions cited by the Cross-Petitioners in support of the supposed 'conflict' with the Fifth Circuit's 'position' agree that the decision in *Hess* is germane." Opposition Brief at 7. That is our point exactly. The Fifth Circuit is out of step with the other courts of appeals in determining that *Hess*'s holding (that "the most salient fac-

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[2] And of course, in cases such as this -- in which there is no claim that any judgment would be payable out of the State treasury -- it will *never* be true that all factors point in favor of a grant of Eleventh Amendment immunity.

tor in Eleventh Amendment determinations" is whether any judgment against the entity is payable from a State treasury) is applicable to bistate entities only. While numerous appeals courts have expressed confusion regarding the precise meaning of *Hess* -- *see, e.g., Mancuso,* 86 F.3d at 293 ("The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused") -- only the Fifth Circuit (in *Pillsbury*) has held it inapplicable to single-state entities. Nothing in the Fifth Circuit's brief discussion of Eleventh Amendment issues in this case so much as hints that it has abandoned *Pillsbury* and (in accord with at least four other circuits) will henceforth treat the "State treasury" factor as "the most salient factor in Eleventh Amendment determinations."

7. TEAJF suggests that whatever inter-circuit conflict may have existed regarding the meaning of *Hess* was resolved by the Court's recent decision in *Regents of University of California v. Doe,* 117 S. Ct. 900 (1997). To the extent that *Regents* touches on relevant Eleventh Amendment issues, it resolves them in WLF's favor. Citing *Hess, Regents* states, "Of course, the question whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued." *Regents,* 117 S. Ct. at 904. The Court's citation to *Hess* in a case involving a single-state entity is strong evidence that the Court intended *Hess*'s "most salient factor" mandate to apply to Eleventh Amendment analysis of single-state entities as well as bistate entities. *Regents* strengthens WLF's argument that it is the Fifth Circuit that has misconstrued *Hess*; by no means does it provide a rationale for permitting the Fifth Circuit's Eleventh Amendment analysis to stand.

CONCLUSION

As stated in WLF's response to the Petition in No. 96-1578, the Petition in that case should be granted in part. The Cross-Petition in No. 96-1766 should be granted as well.

Respectfully submitted,

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